STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
TANNER APPEAL BOARD

In the Matter of an Appeal Under the Tanner Act, Health and Safety Code Section 25199 et seq., Kern County's Approval of Conditional Use Permit No. 4, Map 97:
PADRES HACIA UNA VIDA MEJOR, an unincorporated association, JUANITA FERNANDEZ, LORENZO GARCIA, ROSA SOLORIO-GARCIA, DORA MONTOYA, EDUARDO MONTOYA, SAUL MORENO, SYLVIA MORENO, MANUEL PEREZ AND JUAN REYES,

Appellants,

v.

COUNTY OF KERN and SAFETY-KLEEN (BUONWILLOW), INC.,

Respondents.

PRELIMINARY HEARING DECISION AND ORDER

During July, 1991, Respondent Safety-Kleen (Buttonwillow,) Inc.'s predecessor corporation began the process to enlarge its hazardous waste facility located on Lokern Road, outside of the unincorporated community of Buttonwillow, California. In order to evaluate Safety-Kleen's proposed expansion, Respondent Kern County initiated a public review as required by the Tanner Act found at Health and Safety Code (HSC) 25199.

After completing the underlying public review required by the Tanner Act on December 12, 1994, the Kern County Board of Supervisors approved a Conditional Use Permit (CUP) granting Respondent Safety-Kleen authority to expand the capacity of its Lokern Road hazardous waste facility.

On January 9,1995, the Center on Race, Poverty and the Environment, a subdivision of the California Rural Legal Assistance Foundation (CRLA) filed an HSC 25199.9(e) interested party appeal on behalf of a local citizens group and several private citizens. Pursuant to Health and Safety Code Section 25199.9(e) the CRLA appeal challenged Kern County's decision to permit the expansion of the hazardous waste facility near Buttonwillow, which is operated by Safety-Kleen.

The California Environmental Protection Agency (Cal/EPA) initially received the CLRA's application for appeal in January, 1995. Pursuant to Health and Safety Code section 25199.10(a), Cal/EPA returned the application because all permits necessary for the expansion had not been obtained. In late July, 1999, CLRA resubmitted its appeal. Issues concerning the timeliness of the appeal were subsequently resolved by the Kern County Superior Court. After considering the parties' arguments, the court issued a preemptory writ commanding the Appeal Board be convened.

The Governor designated Cal/EPA Agency Secretary Winston H. Hickox to perform the Governor's statutory duties under the Tanner Act. On January 17, 2001, Secretary Hickox, pursuant to Health and Safety Code section 25199.10, began the appeal process by requesting the California Association of Counties and the League of California Cities to nominate two members each of the Appeal Board for appointment respectively by the Senate Rules Committee and the Speaker of the Assembly. The

other statutory members of the Appeal Board are the chair of the Air Resources Board, the chair of the State Water Resources Control Board, and the director of the Department of Toxic Substances Control.

The members of the Appeal Board empanelled to hear this matter are Steve Perez, Supervisor, Kern County, Bill Maze, Supervisor, Tulare County, M. J. Dube, Council Member, City of Twenty-Nine Palms, Ron Waldrop, Mayor pro tem, City of Taft, Peter D. Venturini, Chief of the Air Resources Board's Stationary Source Division, as alternate to Alan Lloyd, Chair of the Air Resources Board, Barbara Evoy, Chief of the State Water Resources Control Board's Clean Waters Programs Division, as alternate for Arthur Baggett, Chair of the State Water Resources Control Board and Marilee Hanson, Senior Staff Counsel, Department of Toxic Substances Control, as alternate for Edwin F. Lowry, Director of the Department of Toxic Substances Control.

The Tanner Appeal Board began fifteen days of public preliminary hearing and deliberation required by Health and Safety Code 25199.13, in Bakersfield, California, on November 14, 15, and 16, 2001. The Board continued the hearing on January 16, 17, and 18; March 13, 14, and 15; May 1, 2, and 3 and May 8, 9, and 10, 2002. The record was closed on May 24,

PRELIMINARY HEARING JURISDICTION

The Tanner Act requires the Board to conduct a preliminary hearing to determine whether or not to accept Appellants' Third Amended Appeal (HSC section 25199.13(b).) The arguments and evidence presented to the appeal board convened pursuant to subdivision (e) of section 25199.9 shall only concern whether or not a condition or conditions imposed on the project by the land use decision do not adequately protect

public health, safety, and welfare. (HSC 25199.13(b).) The appeal board may only accept an appeal by an affirmative vote of five members of the appeal board after considering the arguments and evidence presented at the preliminary hearing. The decision stating the reasons for accepting or rejecting the appeal shall be in writing and signed by the members. The appeal board may not accept the appeal unless it finds that the appellants have demonstrated a substantial likelihood of prevailing on the merits. (HSC 25199.13(c).) The appeal board must determine the likelihood of prevailing on the merits based on clear and convincing evidence. (HSC 25199.13(d).) The local agency in this case, the County enjoys a rebuttable presumption that the CUP adequately protects public health, safety, & welfare. The burden of proof to rebut this presumption shall be with the interested party (HSC 25199.13(d).)

THE PARTIES

The parties to this dispute are Appellants, Padres Hacia Una Vida Mejor, an unincorporated association, Juanita Fernandez, Lorenzo Garcia, Rosa Solorio-Garcia, Dora Montoya, Eduardo Montoya, Saul Moreno, Sylvia Moreno, Manuel Perez, and Juan Reyes, represented by Attorneys, Luke W. Cole and Caroline Farrell, of the Center on Race, Poverty & the Environment and Respondent County of Kern, represented by Stephen D. Schuett, Assistant County Counsel, Respondent Safety-Kleen Buttonwillow, Inc,. represented by J. Martin Robertson of Gray Cary Ware & Freidenrich and Michael M. Hogan of Hogan Guiney Dick.

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DISCUSSION AND VOTE WHETHER OR NOT TO ACCEPT

OR REJECT THE APPEAL

The Appellants filed their Third Amended Appeal on April 12, 2001. The parties resolved a number of the issues raised in the Appellants' original appeal filed on January 9, 1995. At the hearing the Board dismissed issue S and the mitigation measures found on page seven of the Third Amended Appeal, as res. judicada. The remaining ten issues were considered by the Board during fifteen days of hearing. The Board members' individual decisions are attached as an appendix to this decision and order. Those remaining issues and the Board members' determination to accept or reject the appeal are as follows:

A. Federal, State and Local Permit Application Condition 5 does not adequately protect the public health, safety and welfare because it allows future extensions of the permit without the opportunity for the public to have input on the extension through the Tanner process. Thus, changes in technology, Safety-Kleen's track record in the interim, and impacts of the facility discovered during the operation of the facility will be essentially exempt from Tanner review for the operative life of the permit. Additionally, condition 5 contains no "end" date for the permit, allowing the permit to be renewed indefinitely. A more stringent condition 5 would mandate Tanner review of the project every five years to ensure that the public health, safety and welfare were indeed being protected by the current permit conditions; it would also limit the number of extensions of the permit possible to one.

C. Federal, State and Local Permit Application Condition 7 does not adequately protect the public health, safety and welfare because the County currently

does not monitor or enforce this provision or other provisions of the California Code of Regulations at the Buttonwillow facility. Without monitoring or enforcement, it is impossible for the County to know whether or not the permit condition is being met, and the permit condition is meaningless. A more protective condition would create the position of "public advocate" at the facility, in which Safety-Kleen would pay for the County or an interested community group to hire a facility watchdog, who was independent of both Safety-Kleen and the County, to ensure compliance with permit conditions such as condition 7.

N. Closure/Post-Closure Condition 2 does not adequately protect the public health, safety and welfare because it does not accurately reflect state and federal law. Under the Resource Conservation and Recovery Act (RCRA), closed landfills are to be cared for and monitored for at least 30 years, and can be required to be cared for and monitored indefinitely if there is a need. A significantly more protective condition would require indefinite post-closure care and monitoring, because the landfill is *least* likely to require attention in the first thirty years after closure and *most* likely to need such attention further out in the future. Further, Safety-Kleen has declared bankruptcy in the years since the permit was issued, which must be factored in to any financial and post-closure assurances given under the CUP.

O. Closure/Post Closure Condition 3 does not adequately protect the public health, safety and welfare because the condition does not specify what type of financial assurance should be provided. One type of financial assurance which would avoid the County being left holding the clean-up bag after Safety-Kleen's recent bankruptcy would be a performance bond for the full clean-up and closure amount. Another more

protective condition-and one less subject to the business health of Safety-Kleen – is an independent post-closure fund maintained and increased each year by Safety-Kleen. Such a fund is only one type of post-closure financial assurance contemplated by state, federal statutes, but should be required as it is most protective of the public health, safety and welfare. Safety-Kleen has declared bankruptcy in the years since the permit was issued, which must be factored in to any financial and post-closure assurances given under the CUP.

P. The Air Quality Conditions do not adequately protect the public health, safety and welfare because even with all four conditions, the facility will cause a cumulative significant impact to air pollution in the San Joaquin Valley Air Basin. More protective conditions and mitigations (which were brought up by *Padres* but rejected by Safety-Kleen and the County during the CEQA process) would include an offset requirement so that Safety-Kleen would have to purchase old, high-emission automobiles in the San Joaquin Valley to offset all criteria pollutants which will be emitted by the operations of the expanded dump. Such a condition would be easy to implement and be significantly more protective of the public health than the current conditions. Similar programs have been used by oil refineries in the Los Angeles air basin to achieve emissions offsets. Additionally, the current permit does not require Safety-Kleen to abide by the air mitigation promised in the EIR, specifically it does not require Safety-Kleen to provide a protective foam to achieve 99% VOC air emissions reductions. A more protective permit condition would require such mitigation, as was promised to the Kern County public in the EIR.

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Q. General Condition 3 does not adequately protect the public health, safety and welfare because Safety-Kleen is not abiding by the EIR, as outlined in Appeal Issue P. Further, the EIR does not address the acceptance of radioactive waste. A more protective condition would bar the acceptance of all radioactive waste except Naturally Occurring Radioactive Material (NORM) waste.

Y. Waste Type Condition 2 does not adequately protect the public health, safety and welfare because it allows for the dump to dispose of radioactive waste, including waste with human-created radiation and waste with radiation above naturally occurring background levels. A more protective condition would bar such waste. Further, Waste Type Condition 2 does not ban the importation of foreign waste. A more protective permit condition would do so.

AA. Closure/Post-Closure Condition 3 does not adequately protect the public health, safety and welfare because it does not take into account Safety-Kleen's declaration of bankruptcy and the fact that the acceptance of radioactive waste may substantially increase post-closure and clean-up costs. More protective permit conditions would address these issues.

BB. Closure/Post Closure Condition 4 does not adequately protect the public health, safety and welfare because it does not take into account Safety-Kleen's declaration of bankruptcy and the fact that the acceptance of radioactive waste may substantially increase post-closure and clean-up costs. More protective permit conditions would address these issues.

CC. General Condition 5 does not reflect the impact of Safety-Kleen's bankruptcy and its acceptance of radioactive waste on its insurance coverage.

CONCLUSION: The Board voted to accept only Issue Y for appeal by a vote of 5 to 2. All nine other issues failed to achieve the required 5 affirmative votes to accept the issues for appeal.

NOW, THEREFORE, IT IS ORDERED to convene a hearing into Issue Y, pursuant to HSC 25199.13.

Dated this 18th day of July, 2002

James R. Ryden
Administrative Law Judge

STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
CALIFORNIA AIR RESOURCES BOARD

FINDINGS AND CONCLUSIONS REGARDING PRELIMINARY HEARINGS ON APPELLANTS APPEAL

In the Matter of an Appeal Under the Tanner Act, Health & Safety Code Section 25199 et seq., Kern County's December 12, 1994, Approval of the Conditional Use Permit Granted to Safety Kleen's Buttonwillow Hazardous Waste Disposal Facility

PADRES HACIA UNA VIDA MEJOR, an Unincorporated association, JUANITA FERNANDEZ, LORENZO GARCIA, ROSA SOLORIO-GARCIA, DORA MONTOYA, EDUARDO MONTOYA, SAUL MORENO, SYLVIA MORENO, MANUEL PEREZ, AND JUAN REYES,

Appellants,

V.

COUNTY OF KERN AND SAFETY KLEEN (BUTTONWILLOW), INC.,

Respondents.

On May 10, 2002, the Tanner Appeal Board concluded 15 days of evidentiary hearings regarding issues raised by Appellants pertaining to Kern County's December 12, 1994, Conditional Use Permit (CUP) issued to Safety Kleen's Buttonwillow hazardous waste facility. Appellants argued that the CUP is not adequately protective of public health, safety, and welfare.

The task of the Tanner Appeal Board during these preliminary evidentiary hearings was to determine whether or not a condition or conditions imposed on the project by the land use decision do not adequately protect public health, safety, and welfare. An affirmative decision to accept the appeal requires five affirmative votes (out of seven), the decision must be based on the record, and the decision must be in writing. Further the standard for accepting the appeal is "a substantial likelihood of prevailing on the merits". If the appeal is accepted on one or more of the issues presented, then further evidentiary hearings must be held to determine what changes are to be made, if any, to the CUP issued by the County.

The appeal board is comprised of seven appointed members.

1. Steve Perez, Supervisor and Chair, Kern County Board of Supervisors.
2. M.J. Mac Dube, Councilman, City of Twentynine Palms.
3. Bill Maze, Supervisor, Tulare County
4. Ronald Waldrop, Mayor Pro Tempore, City of Taft.
5. Peter Venturini, Chief Stationary Source Division, Air Resources Board (ARB) (Representing Dr. Alan Lloyd, Chair ARB).
6. Barbara Evoy, Chief Division of Clean Water Programs, State Water Resources Control Board (SWRCB) (Representing Arthur Baggett Jr., Chair SWRCB).
7. Marilee Hanson, Senior Staff Counsel, Department of Toxic Substances Control (DTSC) (Representing Ed Lowry, Director DTSC)

James Ryden, Administrative Law Judge, presided over the hearings.

Appellants Padres raised twelve issues in their pre-hearing brief. Of these, two were dismissed from consideration by Judge Ryden, leaving 10 issues for the Board's consideration. Many of the issues have common themes and can be grouped into the following six areas,

- Radioactive Waste
- Closure/ Post Closure Requirements
- Air Emissions
- Bankruptcy
- Five Year Permit Renewal
- Enforcement

The findings and conclusions presented below, by issue, are based upon the extensive testimony presented during the 15 days of evidentiary hearings and on the numerous exhibits included in the record.

Radioactive Waste

Findings

1. There are radioactive wastes that are not subject to Nuclear Regulatory Commission (NRC) regulation. The Department of Energy (DOE), Department of Defense (DOD), and the Army Corps of Engineers manage radioactive wastes that are not subject to NRC regulation. Thus based on the CUP, such wastes could be accepted at the Buttonwillow facility.

2. The DTSC condition that radioactive waste may not exceed 2,000 pci/g it is not specific to the type and concentration of radionuclides allowed. One cannot determine if the 2,000 pci/g limitation is protective because it depends on the specific radionuclides, their concentrations, and their relative health effects. Further the basis for the 2,000 pic/g limit is a Department of Transportation (DOT) placarding requirement, and the basis for DOT's determination is uncertain. Further, the California Department of Health Services (DHS) did inform DTSC that a 2,000-picocurie-per-gram limit is "a relatively significant level of radioactivity which poses obvious and definite safety and health risk."

3. Because of the CUP condition that allows acceptance of non-NRC regulated radioactive waste, the facility accepted Army Corp of Engineers waste from a Linde Air Products site in Tonawanda, New York. These radioactive building wastes resulted from nuclear research during the World War II Manhattan Project. These wastes are not subject to regulation by the NRC because they were generated before NRC had jurisdiction over such materials. Had these wastes been generated post 1978, NRC would have

jurisdiction over these wastes and they would have to be disposed of in NRC regulated facilities designed to contain the waste for 1,000 years. Safety Kleen also accepted waste from the Santa Susana Nuclear Facility in Southern California. These wastes were contaminated soil from a sodium burn pit. The Kettlemen Hills hazardous waste facility was initially going to accept this waste, but declined to do so when they learned it was radioactive.

4. The Buttonwillow facility, since it began operating, has been accepting petroleum waste that contains Naturally Occurring Radioactive Materials or NORM. NORM is a term commonly used to address the radioactive material associated with petroleum and geothermal drilling activities. However, there is a major regulatory gap with respect to NORM waste with no Federal or California regulations addressing NORM waste. The NORM waste being accepted at the Buttonwillow facility has an average concentration of 480-570 pic/g of radionuclides. While testimony indicated that speciation data for the drilling NORM disposed of at the Buttonwillow facility were not available, it was stated that Radium is a main constituent of drilling NORM. These concentrations of NORM waste are higher than the average concentration of waste from the Linde site (480 pic/g).

5. The Environmental Impact Report (EIR) for the CUP does not address the impacts associated with acceptance of non-NRC regulated radioactive waste. Thus no formal peer reviewed risk assessment or other public information was provided during the permitting process on the short and long-term impacts and risks associated with the facility being allowed to accept radioactive wastes, including NORM. Further the County's Hazardous Waste Management Plan does not address radioactive wastes or NORM.

6. DHS, which has principal regulatory authority in California for radioactive waste, was apparently not consulted during the preparation of the CUP regarding the adequacy of the permit conditions relating to radioactive waste.

7. Safety Kleen operates another hazardous waste facility in Imperial County (Westmorland facility). That facility's CUP prohibits acceptance of radioactive waste except for NORM as long as the NORM contains less than specified concentrations of identified radionuclides.

8. Safety Kleen has stated that their policy is to no longer accept non-NORM radioactive waste. Because the facility is in the process of being sold, this policy may not extend to the new owners and the policy could be changed at any time. Further, NORM is not formally defined as applying only to petroleum and geothermal drilling wastes. In fact, Safety Kleen characterized the Linde waste as being NORM waste.

9. Pending California legislation (Romero SB 1623) would preclude hazardous waste facilities from accepting the types of non-NRC waste that the Buttonwillow facility has accepted. The bill also would allow DTSC to develop standards for the regulation of NORM waste. If this bill becomes law, it will likely be some time before DTSC is able to develop and adopt regulations addressing NORM.

10. It is important to have facilities in California for the proper disposal, management and long term care of NORM waste associated with petroleum and geothermal drilling activities. The Buttonwillow facility is a well-designed facility and appears to be well managed under its current management. However, the lack of any regulations regarding the definition, acceptance, management, and long term care of NORM waste combined with the lack of specificity in the CUP and the companion DTSC permit regarding radioactive waste, raises serious questions regarding the adequacy of the CUP regarding radioactive waste.

CONCLUSION - The appeal be accepted with respect to issues associated with the acceptance of radioactive wastes (Issue Y). There is clear and convincing evidence that there are compelling reasons to modify the permit with respect to the facility's acceptance of radioactive waste including NORM and appellants have a substantial likelihood of prevailing on the merits.

Closure/Post Closure Requirements

Findings

1. The closure/post closure requirements imposed on the facility stem from DTSC regulations that are based on Resource Conservation and Recovery Act (RCRA) requirements. These requirements only address hazardous waste and not radioactive waste. Radioactive waste is not defined as a hazardous waste under RCRA or DTSC regulations. DHS has sole authority over radioactive waste in California.

2. Although the CUP specifies a 30-year post closure care period, DTSC does periodically review post closure requirements for hazardous waste facilities. Testimony indicates that it has been DTSC's practice to extend the closure periods when these 5-year reviews are conducted. Therefore, the 30-year specification in the CUP would be over ridden by DTSC if it determines, when it reviews the facility permit, that an extension of the closure period is warranted.

3. It is unclear if the post-closure requirements in the DTSC permit reflect the acceptance of radioactive waste and if the 30-year post closure period included in the DTSC permit is reflective of the acceptance of radioactive waste, including NORM, at the facility. It is also unclear if DTSC has the authority to set closure/post closure requirements based on radioactive waste acceptance or if this jurisdiction falls to DHS.

4. The evidence indicates that facilities licensed to accept radioactive waste have design requirements for 1,000 years of containment and at least 100 years of post closure care.

5. The acceptance, management, and long- term care of radioactive wastes, including NORM, with regard to public health and safety are closely linked issues. It therefore is appropriate to consider closure/post closure requirements in conjunction with other radioactive waste issues.

CONCLUSION - The appeal be accepted with respect to issues associated with closure and post-closure care relating to radioactive waste including NORM waste (Pertinent parts of Issues Q, Y, AA, BB. Deny with respect to Issue N and O.). There is clear and convincing evidence that there are compelling reasons to modify the permit with respect to the facility's closure and post closure requirements, except with respect to Issue N, relating to acceptance of radioactive waste including NORM and appellants have a substantial likelihood of prevailing on the merits.

Air Emissions

Findings

1. An EIR is an information document. It identifies the project; the potential impacts associated with the project; and potential mitigation measures. An EIR does not dictate ultimate permit conditions.

2. The air district did condition the air permit to the acceptance of daily and annual waste quantities identified in the EIR. Further the district designed the air permit to limit annual volatile organic compound (VOC) emissions to the 10.3 tons per year calculated in the EIR. The district testified that the VOC control efficiency was 99% reached through a combination of technologies and practice. The EIR envisioned 99% control of VOC emissions.

3. The Best Available Control Technology (BACT) determination made by the district is consistent with their rules and regulations and is reflective of the fact that engineering judgment is often necessary when making such determinations.

4. In calculating VOC emissions, the district used the CHEMDAT 8 model as recommended by the United States Environmental Protection Agency (USEPA). The SEAMS model used by the appellants witness is a screening model and was not recommended for use by USEPA.

5. Offsets were not required because the project resulted in a net reduction in VOC emissions as compared to the project before modification.

CONCLUSION – Reject appellants request for appeal with respect to air emissions (Issue P). Appellants did not present clear and convincing evidence that they would have a substantial likelihood of prevailing on the merits.

Bankruptcy

Findings

1. Appellants provided no witnesses to address this issue.

2. The insurance policy provided by Safety Kleen cannot be cancelled due to bankruptcy even if premiums are not paid. The financial assurance mechanism provided by Safety Kleen is also consistent with state requirements

CONCLUSION – Reject appellants request for appeal with respect to bankruptcy issues (Pertinent parts of Issues AA, BB, CC). Appellants did not present clear and convincing evidence that they would have a substantial likelihood of prevailing on the merits.

Five Year Permit Renewal

Findings

1. Appellants provided no witnesses with regard to this issue.

2. The County has authority under its ordinances to open the CUP at any time it believes the conditions of the permit are not adequate to protect public health.

3. Any significant modifications to the facility would require issuance of a new CUP.

CONCLUSION – Reject appellants request for appeal with respect to permit renewal issues (Issue A). Appellants did not present clear and convincing evidence that they would have a substantial likelihood of prevailing on the merits.

Enforcement

Findings

1. No witnesses were provided to testify on this issue.

2. The Appeal Board does not have jurisdiction over enforcement. If Appellants are concerned about lack of enforcement, they should appeal to the appropriate enforcement agencies or seek Court relief.

CONCLUSION – Reject appellants request for appeal with respect to enforcement issues (Issue C). Appellants did not present clear and convincing evidence that they would have a substantial likelihood of prevailing on the merits.

Findings submitted by,

Peter Venturini, Chief
Stationary Source Division
California Air Resources Board
Tanner Appeal Board Member,
Representing Alan Lloyd, Chair
Air Resources Board

6/26/02
Date

I concur with the above findings,

Alan Lloyd, Chairman California
Air Resources Board

6/26/02
Date

Department of Toxic Substances Control

Edwin F. Lowry, Director
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P.O. Box 806
Sacramento, California 95812-0806

Winston H. Hickox
Agency Secretary
California Environmental
Protection Agency

Gray Davis
Governor

June 14, 2002

Hand Delivered

Mr. James R. Ryden
Administrative Law Judge
Air Resources Board
Administrative Hearing Office
1001 "I" Street
P.O. Box 2815
Sacramento, California 95812

PADRES HACIA UNA VIDA MEJOR (APPELLANTS) V. COUNTY OF KERN and SAFETY-KLEEN (BUTTONWILLOW), INC. (RESPONDENTS); PRELIMINARY DECISION

Dear Judge Ryden:

Enclosed please find my decision regarding whether to accept or reject the appeal presented by Padres Hacia Una Vida Mejor (Appellants) of certain conditions in the conditional use permit issued by Kern County for the hazardous waste disposal facility currently operated by Safety Kleen (Buttonwillow), Inc. in Buttonwillow, California, Appellants filed their appeal pursuant to Health and Safety Code section 25199 et seq..

My decision is organized by the issues presented in the Appellants' Third Amended Appeal filed on April 11, 2001 and their Post-Hearing Brief filed on May 23, 2002. My decision is governed by the standards in Health and Safety Code section 25199.13, subdivision (c), which states that the appeal board may not accept the appeal unless it finds that the proponent or interested party has demonstrated a "substantial likelihood of prevailing on the merits if the appeal is accepted for hearing."

In order to determine whether the Appellants have demonstrated a substantial likelihood of prevailing on the merits if the appeal is accepted, I understand that Health and Safety Code section 25199.13, subdivision (d) requires the appeal board to adopt a rebuttable presumption that the local agency's land use decision is supported by substantial reasons and that there are no compelling reasons to modify it. Additionally,

subdivision (d) places the burden of proof on the Appellants to rebut this presumption and to establish, by clear and convincing evidence, that there are compelling reasons to modify Kern County's land use decision.

Please feel free to call me with questions or comments.

Very truly yours,

Edwin F. Lowry

Edwin F. Lowry
Director

Enclosure

DEPARTMENT OF TOXIC SUBSTANCES CONTROL
DECISION ON WHETHER TO ACCEPT OR REJECT THE APPEAL
OF PADRES HACIA UNA VIDA MEJOR

1. FEDERAL, STATE AND LOCAL PERMIT APPLICATION CONDITIONS

Issue A: *Federal, State and Local Permit Application Condition No. 5*-- This condition governs renewals of the conditional use permit (CUP). Appellants assert this condition does not adequately protect public health, safety and welfare because it: (1) allows the facility to operate indefinitely; (2) expressly exempts a request for extension from Tanner Act review; and (3) limits the types of new conditions and restrictions that can be imposed at the time extension requests are filed.

Decision: The Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issues (1) and (3). The Appellants have not demonstrated that Kern County (the County) does not possess other authority, such as section 19.102.020 of the County Code , General Condition No. 5 and Federal, State and Local Condition No. 2, which would enable the County to limit the time the facility operates and/or place other appropriate conditions and restrictions on the facility. The Appellants have also not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (2) because they have not demonstrated that a request to extend the authorization for a facility constitutes a request to "significantly expand or modify" the facility under section 25199.1, subdivision (l) of the Health and Safety Code.

Issue C: *Federal, State and Local Permit Application Condition No. 7*-- This condition requires the facility to operate in compliance with California Code of Regulations, titles 22 and 23. Appellants assert this condition: (1) does not adequately protect public health, safety and welfare because the County does not monitor or enforce this provision. Therefore, the Appellants argue, the County does not know whether the condition is being met and it is meaningless; and (2) should be amended to create the position of "public advocate".

Decision: The Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (1). In general, the Department of Toxic Substances Control (DTSC) enforces the California Code of Regulations, title 22 and the Central Valley Regional Water Quality Control Board and the State Water Resources Control Board enforce California Code of Regulations, title 23. Even if, *arguendo*, the County does not enforce the provisions of California Code of Regulations, titles 22 and 23, Appellants have not demonstrated that this practice results in inadequate protection of public health, safety and welfare, when viewed in context with the fact

that the State agencies enforce these provisions. Appellants also did not provide clear and convincing evidence that the County does not monitor compliance, which apparently the County uses as a measure of whether to modify or revoke the CUP (See, Respondents' Post-Hearing Brief at page 4, citing Transcript, Volume V, at 1042:5-14).

Appellants also have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (2). Appellants proposed a public advocate in their appeal of DTSC's permit, which they filed on April 8, 1996. DTSC rejected this proposal for the reasons cited in its Order Denying Petition for Review issued May 14, 1996 (Exhibit 32, pages 39-40.) For the foregoing reasons, Appellants have not demonstrated a substantial likelihood that they would prevail if the appeal board accepted this issue for appeal.

2. AIR QUALITY CONDITIONS

Issue P: *Air Quality Conditions Nos. 1 through 4*—These four conditions require the facility to: (1) properly maintain equipment to minimize Nox emissions; (2) apply sufficient water to control fugitive dust and submit a water schedule for approval by the County; (3) obtain appropriate Authorities to Construct (ATC) and Permits to Operate from the San Joaquin Valley Unified Air Pollution Control District (the Air District); and (4) implement adequate measures to control dust that are acceptable to the Air District. Appellants state these conditions do not adequately protect public health, safety and welfare because the conditions rely on the ATC issued by the Air District and the ATC does not require "foam or an equivalent technology" as identified in the Environmental Impact Report (SEIR). Appellants also assert that the face of Waste Management Unit (WMU) 35 should be covered with foam at the end of each working day.

Decision: The Appellants have not demonstrated a substantial likelihood of prevailing on the merits. The SEIR stated that waste on the open face of WMU 35 "will be covered by foam or an equivalent technology", which would provide 99% control of the emissions of VOCs (Transcript, Volume VIII at 1727: 3-6). According to Mr. Sayed Sadredin, Director of Permit Services for the Air District, the ATC requires "foam or an equivalent technology". (Transcript, Volume VIII at 1727:7-11). Mr. Sadredin testified that the combination of technologies and practices required by the ATC (including limiting the VOC content of the waste, using a compacted soil cover and covering with foam at certain times) will control the emissions of VOCs by approximately 99.5%. (Transcript, Volume VIII at 1727:23-25). The Air District found that offsets for VOCs were not necessary (Transcript, Volume VIII at 1750:1-3). Finally, the County found that use of offsets for

NOx from trucks is infeasible and the Air District found the NOx emissions to be "unmitigatable." (Respondents' Post-Hearing Brief at 12, citing testimony in the Transcript and various exhibits.)

3. CLOSURE/POST CLOSURE CONDITIONS

Issue N.: *Post Closure Condition No.2*-- This condition requires the facility to conduct post-closure care for each unit beginning immediately after the unit is closed and continuing for thirty (30) years after the facility has received the last load of hazardous waste in accordance with State and federal law. Appellants assert this condition does not adequately protect public health, safety and welfare because it: (1) reduces the term of post-closure care; (2) precludes extensions of the 30-year post-closure term; (3) does not accurately reflect State and federal law because under those laws, landfills can be required to be cared for and monitored indefinitely; and (4) factor Safety Kleen's bankruptcy into any financial and post-closure assurances under the CUP.

Decision: The Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issues (1), (2) and (3). I agree that language in the CUP is not literally consistent with the requirements in the State regulations. California Code of Regulations, title 22, section 66264.117, subsection (b)(1) also sets the 30 year term for post-closure care and subsection (b)(2)(B) authorizes DTSC to extend post-closure care. In DTSC's 1996 Order Denying Petition for Review, DTSC stated that "... should circumstances necessitate a longer post-closure period, the Department will take appropriate action." (Exhibit 32 at pages 22-23 and 29-30.) DTSC also conducts five-year reviews of facilities and can reset the 30 year horizon at those times. The California Code of Regulations, title 23, section 2580, subsection (a) requires the post-closure maintenance period to "... extend as long as the wastes pose a threat to water quality." Post-Closure Care Condition No. 2 in the CUP requires the facility to provide post-closure care " in accordance with State and federal laws". Federal, State and Local Permit Condition Nos. 2 and 7 require the facility to implement requirements of the permits issued by DTSC and the Central Valley Regional Water Quality Control Board (the Regional Board) and comply with California Code of Regulations, titles 22 and 23 respectively. The Waste Discharge Requirements (WDRs) issued by the Regional Board state "[t]he post-closure maintenance period shall continue as long as waste in the closed waste management units pose a threat to water quality." (Exhibit 35 at page 17.) Both the DTSC permit and the County's CUP incorporate the

WDRs.[1] I agree with the Appellants that the inconsistency between the CUP's condition and the State regulations raises ambiguities. However, I do not agree that these inconsistencies, when read together with other provisions of the CUP, the DTSC permit, California Code of Regulations, titles 22 and 23 and the WDRs, cause the condition to fail to adequately protect of public health, safety and welfare. For all of the foregoing reasons, for Sub-issues (1),(2) and (3), Appellants have not demonstrated that Post-Closure Condition No. 2 in the County's CUP actually reduces the term of post-closure care or precludes extensions of the 30-year post-closure term. Therefore, Appellants have not demonstrated a substantial likelihood of prevailing on the merits if these issues were accepted for appeal. To eliminate any possible confusion, I recommend that the County revise this condition to clearly comply with the State and federal requirements when and if the County decides to extend the use permit.

The Appellants have not demonstrated that bankruptcy has not been factored in to the requirement to provide post-closure care in compliance with State and federal laws; thus they have not demonstrated a substantial likelihood of prevailing on Sub-issue (4). This is particularly the case because evidence in the record indicates that the facility's post-closure care insurance policy meets the requirements concerning bankruptcy protection that are found in the California Code of Regulations, title 22, section 66264.145, subsection (e)(8). (Exhibit 203.) Also, according to Ms. Marianna Buoni, General Manager of the facility, it is likely that the bankruptcy court will approve sale of the facility to another company in the near future. (Transcript at Vol.VII at 1440:4 - 1441:12) Appellants have not rebutted this testimony. Thus, it is likely that the bankruptcy issue will soon become moot.

Issues O. and AA: *Post Closure Condition No. 3*—This condition requires the facility to demonstrate continuous compliance with the California Code of Regulations, title 22, sections 66264.143 and 66264.145, which govern financial assurance for closure and post-closure, respectively. The condition also requires the facility to comply with the California Code of Regulations, title 23, section 2550.0, subsection (b), which requires assurances of financial responsibility for initiating and completing corrective action for all known and reasonably

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[1]The requirement in the CUP to provide post-closure care for 30 years should be viewed as a minimum requirement, not as a prohibition on additional post-closure care, when considered in the context of the DTSC and Central Valley Regional Water Quality Control Board requirements.

foreseeable releases from the waste management unit. Appellants assert this condition does not adequately protect public health, safety and welfare because it does not: (1) specify what type of financial assurance should be provided; (2) take Safety-Kleen's declaration of bankruptcy into account; and (3) account for the fact that the acceptance of radioactive waste may substantially increase post-closure and clean-up costs.

Decision: Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (1). Federal law and California Code of Regulations, title 22, section 66264.145 directs the facility to *select* from one of seven types of financial assurance and DTSC does not allow the facility to use a particular type of financial assurance unless it meets the specifications for that type of financial assurance in the regulations. I am concerned that Appellants' proposal that the CUP *mandate* a particular type of financial assurance conflicts with federal and State hazardous waste regulations. Furthermore, Appellants have not demonstrated that the current process is not protecting public health, safety and welfare. In fact, the facility is using a financial mechanism that is similar to the one Appellants have suggested. (Transcript, Volume XIV at 3109:6-8.)

Appellants have not demonstrated a substantial likelihood of prevailing on the merits on Sub-issue (2) for the reasons cited in my decision above for Sub-issue (4) in Issue N.

Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (3). DTSC does not have the *direct* authority to regulate radioactive waste under the California Code of Regulations, title 22, sections 66264.143 and 66264.145 (financial assurance for closure and post-closure). However, Health and Safety Code section 25247 requires DTSC to obtain approval of closure and post-closure plans from applicable regional water quality control boards, unless immediate approval is necessary for health and safety reasons. Water Code section 13227 requires the applicable regional boards to review the plans to ensure that water quality is adequately protected during closure and the post-closure maintenance period.

The DTSC permit (Conditions II. L. 3 and III. L.3.) requires the closure and post-closure plans to be approved by the Regional Board pursuant to section 13227 of the Water Code and require the permittee to comply with the limitations and requirements imposed by the Regional Board. These same conditions in the DTSC permit state that the "Permitee shall comply with any

limitations and requirements imposed by the Regional Board pursuant to section 13227 of the Water Code." Provision C.6. of the Regional Board's WDRs for the facility states "The Discharger shall maintain financial assurance to provide means to ensure closure and post closure maintenance of each waste management unit in accordance with its approved closure plan... "

The State Water Resources Control Board and the regional water quality control boards have authority to regulate radioactive waste because the California Water Code, section 13050, subdivision (d) defines "waste" regulated under the Water Code to include radioactive waste. In light of the fact that the Regional Board has the authority to regulate radioactive waste, it has the authority to require that the closure and post-closure plans for the facility to account for the acceptance of such waste. If the closure and post-closure plans account for radioactive waste, the cost estimate and financial assurance are required to include any extra costs associated with radioactive materials. Thus, compliance with the process established through California Code of Regulations, title 22, sections 66264.143 and 66264.145, Health and Safety Code section 25247 and Water Code section 13227 can account for increased closure and post-closure costs associated with radioactive waste. If the Regional Board did not consider radioactive waste in its review and approval of the closure/post-closure plans for the facility, it has the authority to do so. The plans and cost estimates can then be adjusted accordingly.[2]

California Code of Regulations, title 23, section 2550.0, subsection (b) states that waste discharge requirements shall require the facility to obtain and maintain assurances of financial responsibility for initiating and completing corrective action for all known or reasonably foreseeable releases from the waste management unit and for initiating and completing all corrective action required by subsection (c) and section 2550.12 of article 5, chapter 15, division 3 of California Code of Regulations, title 23. Subsection (d) of section 2550.0 states that the regulations under article 5 apply during the active life of the unit and the closure, post-closure and

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[2]The closure and post-closure plans and cost-estimates can also be adjusted to include requirements set by the Department of Health Services relative to potential releases of radioactive waste via pathways other than those that might affect water quality.

compliance periods. Compliance with these regulations, in conjunction with Water Code section 13050, subdivision (d) (which includes radioactive waste as a waste regulated under the Water Code) can account for costs associated with clean-up of radioactive waste in financial assurance requirements for clean-up during the active life of the facility (frequently referred to as corrective action) and during closure and post-closure.

Issue BB.: *Post Closure Condition No. 4*—This condition requires the facility to revise the closure and post-closure cost estimates whenever a change in the facility's closure and post-closure plans increases the cost of closure and post-closure as required by the California Code of Regulations, title 22, section 66264.142, subsection (c) and section 66264.144, subsection (c). Appellants assert this condition does not adequately protect public health, safety and welfare because it does not take into account Safety-Kleen's: (1) declaration of bankruptcy; and (2) acceptance of radioactive waste, which may substantially increase post-closure and clean-up costs.

Decision: The Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (1) for the same reasons cited in my decision above for Sub-issue (4) in Issue N.

The Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (2) for the same reasons cited in my decision above for Sub-issue (3) in Issues O and AA .

4. GENERAL CONDITIONS

Issue CC.: *General Condition No. 5*— This condition requires the facility, at all times, to be insured in accordance with State and federal laws. Appellants assert this condition does not adequately protect public health, safety and welfare because it does not reflect the impact of Safety-Kleen's : (1) bankruptcy; and (2) acceptance of radioactive waste on its insurance coverage.

Decision: The Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issues (1) or (2) because they have not provided any convincing evidence indicating that bankruptcy or acceptance of radioactive waste has had an impact on the facility's ability to comply with State and federal laws that require insurance.

5. WASTE TYPES CONDITIONS

Issue Y.: *Waste Type Condition No. 2*— This condition bans acceptance of "U.S. Nuclear Regulatory Commission regulated radiological wastes". Appellants assert this condition does not adequately protect public health, safety and welfare because it allows the facility to dispose of radioactive waste, including waste with human-created radiation and waste with radiation above

naturally occurring background levels, the impacts of which were never reviewed at the time the permit was issued.

Decision: The Appellants have demonstrated a substantial likelihood of prevailing on the merits. Waste Type Condition No. 2 would allow disposal of certain types of radioactive wastes. The Supplemental Environmental Impact Report (SEIR) included this information in the project description. According to Mr. Ted James, Kern County Planning Director, there is no evidence that the County sent the Notice of Preparation for the SEIR to the Department of Health Services (DHS) and no evidence that DHS commented on the SEIR. (Transcript at 1135:6-9 and 1142: 1-12). No evidence was introduced by Appellants or Respondents indicating that DHS reviewed or approved Waste Type Condition No. 2. before it was adopted by the County. Federal, State and Local Permit Condition No. 2 incorporates the 2000 pCi per gram limit that is set forth in DTSC's permit. However, DHS has concluded that 2000 pCi per gram is a "... relatively significant level of radioactivity, which poses an obvious and definite health and safety risk. "(See Appellants' Post-Hearing Brief at page 20, citing Appellant's Exhibit R). DTSC is working with DHS to establish levels acceptable to DHS for inclusion in the DTSC permit. (Exhibit 132 at page SK002773.) However, until the DTSC permit is modified accordingly, Federal, State and Local Condition No. 2 would not limit the concentrations of radioactive materials to a level acceptable to DHS.

6. EIR CONDITIONS

Issue Q.: *General Condition 3*-- This condition states that uses authorized by the CUP are those outlined in the *project description* in the SEIR and requires a modification of the CUP or a new CUP for any expansion beyond the scope of activities and uses specified in the SEIR. (Emphasis added.) Appellants assert this condition does not adequately protect public health, safety and welfare because: (1) Safety-Kleen is not abiding by representations made to the public in the EIR regarding the use of foam to control VOC emissions (see Issue P above); and (2) the EIR does not address acceptance of radioactive waste.

Decision: The Appellants have not demonstrated a substantial likelihood of prevailing on the merits for Sub-issue (1) for the reasons cited in my decision above for Issue P. The Appellants have not demonstrated a substantial likelihood of prevailing on the merits of Sub-issue (2) because Appellants have not demonstrated that the uses authorized by the CUP, such as

acceptance of non-NRC regulated radiological waste, are beyond the scope of the activities and uses specified in the project description of the SEIR.[3]

[3] This conclusion on Issue Q is not an opinion regarding the adequacy of the SEIR's analysis of environmental impacts of the project as described.

State Water Resources Control Board

Executive Office

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Winston H. Hickox
Secretary for Environmental Protection

Gray Davis
Governor

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.swrcb.ca.gov.

TO: James R. Ryden
Administrative Law Judge
Air Resources Control Board
1101 I Street
Sacramento, CA. 95812

FROM: Arthur G. Baggett, Chair
State Water Resources Control Board

DATE: JUN 20 2002

SUBJECT: PRELIMINARY HEARING DECISION IN THE MATTER OF AN APPEAL UNDER THE TANNER ACT, HEALTH AND SAFETY CODE SECTION 25199 ET SEQ., KERN COUNTY'S APPROVAL OF CONDITIONAL USE PERMIT NO. 4, MAP 97

Attached, please find my decision, as a member of the Tanner Board, regarding Padres Hacia Una Vida Mejor, an unincorporated association, Juanita Fernandez, Lorenzo Garcia, Rosa Solorio-Garcia, Dora Montoya, Eduardo Montoya, Saul Moreno, Sylvia Moreno, Manuel Perez and Juan Reyes, Appellants, v. County of Kern and Safety-Kleen (Buttonwillow), Inc., Respondents.

I wish to express my appreciation, as a member of the Tanner Board, for you excellent organization of this process. This has been a long and difficult procedure. You have provided consistent and professional support.

Attachment

cc. Celeste Cantú, EXEC
Harry M. Schueller, EXEC
Barbara L. Evoy, DCWP

Responses to specific contentions by Appellant:

1. FEDERAL, STATE, AND LOCAL PERMIT APPLICATION CONDITIONS

Issue A: Federal, State and Local Permit Application Condition No. 5-- Appellants assert the condition does not adequately protect public health, safety and welfare because it: (1) "allows the facility to operate indefinitely beyond the five-year permit term without County approval of the request for permit extension; (2) limits the type of new conditions that can be imposed on the permit at the time of its extension and (3) excludes future permit extensions from review under the Tanner Act process".

Chairman Baggett's response: The appellants did present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits on Issue #A2 (limits on the types of new conditions), but not Issue #A1 and Issue #A3 above. Condition #5 states that Kern County shall limit the imposition of new conditions and restrictions to those that are required to bring the facility into conformity with the County hazardous waste management plan (CHWMP) to those necessary to assure conformity with State and federal hazardous waste facility laws. Testimony indicated that the CHWMP does not address radioactive waste. State and federal hazardous waste facility disposal laws do not appear to provide comprehensive authority over radioactive waste; no State or Federal agency currently regulates Naturally Occurring Radioactive Material (NORM). While there is legislation currently being discussed that could alter regulatory authorities, the fate and final form of these bills is unknown. Pending legislation does not speak to the validity of Kern County's Conditional Use Permit (CUP) to protect current health and safety issues. While Mr. Ted James, Planning Director of the Kern County's Planning Department, testified that he feels the County has authority to change the use permit and modify conditions, the permit conflicts with that statement and the testimony does not speak to whether the County would absolutely do so. If conclusions from the preliminary hearing are borne out, Condition #5 appears to limit the imposition of new requirements to address radioactive waste issues. As such, this condition is not protective of public health, safety, and welfare.

Issue C: Federal, State and Local Permit Application Condition No. 7-- Appellants assert this condition "The proposed treatment and disposal facility shall be operated in compliance with CCR Title 22 and 23 to assure adequate public protection" does not adequately protect public health, safety and welfare because the County does not monitor or enforce this provision. Therefore, the County does not know whether the condition is being met and it is meaningless.

Chairman Baggett's response: The appellants did not present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue C. CCR Title 22 and 23 appear to be adequately monitored by the State agencies. The appellants were not convincing that violations were unmonitored or that any violation caused a health, safety or welfare problem.

Issue N: Closure/post closure condition #2 is not adequately protective because it neither accurately reflects federal and state law nor takes into account Safety-Kleen's current financial state. Appellants assert this does not adequately protect public health, safety and welfare because it does not: (1) accurately reflect and in fact conflicts with State and federal law (because under those laws, landfills can be required to be cared for and monitored indefinitely); and (2) factor Safety Kleen's bankruptcy into any financial and post-closure assurances under the CUP.

Closure/post closure condition #2 reads: "Applicant shall conduct post-closure care for each unit (except units that are clean closed) beginning immediately after the unit is closed and continuing until thirty (30) years after the Lokern facility has received the last load of hazardous waste in accordance with State and federal laws".

Chairman Baggett's response: The appellants did present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue #N (1) above. Condition #2 conflicts with Title 22 which specifies hazardous waste site post-closure is for at least 30 years, not a maximum of 30 years. The CUP would start post-closure approximately six months earlier than under Department of Toxic Substances Control (DTSC) regulation.

While DTSC has the ability to extend the 30-year post-closure time period stated in their permit, the post-closure language in the CUP does not appear to protect public health, as DTSC does not appear to have regulatory authority over radioactive materials (in operation or post-closure). Radioactive materials may have a longer period of concern to public health and safety than hazardous chemicals normally encountered at Class I landfills.

The State Water Resources Control Board (SWRCB) and the nine Regional Water Quality Control Boards (RWQCBs) have authority to regulate waste that impacts beneficial uses of surface or ground water. Waste is defined as including "sewage and any and all waste substances, liquid, solid, gaseous, or radioactive..." The Waste Discharge Requirements (WDRs) specify that post-closure will continue as long as the waste poses a threat to water quality. This authority does not appear to globally cover all radioactive issues that may effect closure and long-term post-closure, however. For instance, radon gas or radioactive soil that does not threaten water sources would not be regulated by the RWQCBs.

With regard to Safety-Kleen's bankruptcy Issue #N (2) above, there was not convincing evidence that bankruptcy affected the financial assurances needed for the hazardous waste site. The appellants were convincing, however, that the financial mechanism needed to be reviewed in light of the radioactive waste issue. If, as a result of future risk assessment, a different closure design, process, maintenance, or monitoring timeframe is deemed to be more protective of health and safety, this would need to be factored into the financial assurance.

Issues O. and AA: Post Closure Condition No. 3—Appellants assert this condition demonstration of continuous compliance with Titles 22 and 23 CCR sections which involve financial assurance for facility closure and post-closure, does not adequately protect public health, safety and welfare because it does not: (1) specify what type of financial assurance should be provided; (Appellants assert a performance bond and/or an independent post-closure fund would be more effective); (2) take Safety-Kleen's declaration of bankruptcy into account; and (3) account for the fact that the acceptance of radioactive waste may substantially increase post-closure and clean-up costs.

Chairman Baggett's response: The appellants did not present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue #O/AA (1) and (2) above. There was not compelling evidence that the existing financial assurance mechanism was inadequate. The appellants did present compelling evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue #O/AA (3). Closure costs did not account for acceptance of radioactive waste. Acceptance of radioactive waste appears to warrant longer-term and perhaps different protection than that traditionally provided to hazardous waste, based on potential half-life. As described in exhibits and Dr. Chris Whipple's testimony (as Respondent's expert witness on the management and regulation of radioactive materials), radioactive waste facilities have much more stringent post-closure minimum timeframes. Specific radioactive waste exposure standards, which are not now imposed at Safety-Kleen (Buttonwillow), have to be met. As Julie Peterson (Respondent's witness; health physicist for the US Army Corps of Engineer's Hazardous, Toxic, and Radioactive Waste Center of Expertise) testified, waste with the same characteristics as the Linde Waste (Tonawanda, N.Y.), generated after 1978, would be regulated by NRC. As such, it would be required to be isolated for 200-1,000 years in a NRC-licensed, or agreement state licensed, facility. It would have to meet specific radon flux standards that have not been imposed at Safety-Kleen (Buttonwillow).

Testimony by Dr. Chris Whipple (Respondent's expert witness) and Mr. Daniel Hirsch (Appellants expert witness on nuclear policy) indicated that the post closure time frame for radioactive materials could be significantly longer than 30 years, based on the requirements for post-closure care promulgated by State and Federal regulatory agencies that oversee radioactive waste disposal. A reasonable person would conclude that substantially lengthened post-closure care and monitoring would significantly increase costs. The magnitude of the radioactive waste closure cost requirements will need to be evaluated by whatever agency exerts authority over radioactive waste closure. If, as a result of future radioactive waste risk assessment, a different closure or maintenance timeframe is deemed to be more protective of health and safety, this would need to be factored into the financial assurance.

Issue BB. Post Closure Condition No. 4 -- Appellants assert this condition does not adequately protect public health, safety and welfare because it does not take into account Safety-Kleen's: (1) declaration of bankruptcy; and (2) acceptance of radioactive waste, which may substantially increase post-closure and clean-up costs.

Post Closure Condition No. 4 states "Applicant shall revised the closure and post-closure estimates whenever a change in the Lokern Facility's Closure and Post-Closure Plans increase the cost of closure or post-closure as required by Title 22 ...and Title 23..."

Chairman Baggett's response: The appellants did not present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue #BB (1). The appellants did present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue #BB (2).

Issue CC: General Condition No. 5 -- Appellants assert this condition does not adequately protect public health, safety and welfare because it does not reflect the impact of Safety-Kleen's: (1) bankruptcy; and (2) acceptance of radioactive waste on its insurance coverage.

General Condition No. 5 states "At all times, owner/operator shall be insured in accordance with State and Federal laws".

Chairman Baggett's response: The appellants did not present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue #CC (1). The appellants did present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits of Issue #CC (2).

2. WASTE TYPES CONDITIONS

Issue Y: Waste Type Condition No. 2 -- Appellants assert this condition does not adequately protect public health, safety and welfare because it allows the facility to dispose of radioactive waste, including waste with human-created radiation and waste with radiation above naturally occurring background levels.

Condition No. 2 states "The following wastes shall not be accepted for treatment, disposal, storage or transfer at the Lokern facility: ..Infectious wastes, U. S Nuclear Regulatory Commission regulated radiological wastes..."

Chairman Baggett's response: The appellants did present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits on Issue Y. Testimony and evidence clearly show that this condition allows the disposal of several other types of radioactive waste. Regulatory oversight by the Nuclear Regulatory Commission (NRC), Department of Energy (DOE) and the Army Corps of Engineers appears to be based on the time the waste was generated and the generator, not the hazard of the waste. The condition, by itself, allows significant radioactive waste disposal, at unlimited levels, to occur. The 2000 picocurrie/gram limit imposed by the Regional Water Quality Control Board (RWQCB) and DTSC permits appears to have no documented basis in health, safety and welfare. It is non-specific to radionuclide and was implemented many years ago as a transportation regulation. Evidence shows that DTSC is re-evaluating this limit in light of concerns. No regulation of radioactive NORM waste occurs. While the past radioactive waste disposed of at the site may have little risk, the CUP allows unlimited volumes of other radioactive waste, at higher radioactivity levels. The risk of radioactive waste disposal was

not comprehensively evaluated or comprehensively reviewed by any regulatory agency, nor discussed in the supplemental environmental impact report and Part B documents. The facility's radioactive monitoring procedures to document compliance with the DTSC and RWQCB 2000 picocurrie/gram limit in the permits, is unapproved by any regulatory agency. The results of intake monitoring are not kept or reported to any regulatory agency. Radioactive waste constituents are not in the WDR list of chemicals of concern, as they apparently weren't expected at the site. As the WDR stands now, the facility would not monitor for radioactive constituents, should a leak of waste be detected. Dr. Chris Whipple's testimony (as Respondent's expert witness) that he would recommend this type of monitoring to the company does not provide any assurance for health and safety. Safety-Kleen's decision not to accept more radioactive Formerly Used Site Remedial Action Plan (FUSRAP) waste is not compelling as the company is being sold. Without a change to the CUP and DTSC/RWQCB permits, FUSRAP waste is allowed. Appellants provided clear and convincing evidence that this condition, even when read with the DTSC and RWQCB permit, does not ensure health, safety and welfare.

3. AIR QUALITY CONDITIONS

<u>Issue P: Air Quality Conditions Nos. 1 through 4</u> -- Appellants assert these conditions do not adequately protect public health, safety and welfare because even with all four conditions, the facility will cause a cumulative significant impact to air pollution in the San Joaquin Valley Air Basin due to (1) Nox emissions from trucks and (2) because the controls promised in the CUP approval process are not being used to the extent promised.

Chairman Baggett's response: The appellants did not present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits.

The Air Pollution Control District (APCD) appears to have miscalculated the Volatile Organic Chemicals (VOCs) likely to be emitted from soil compacted areas at the facility. The APCD relied on a study that correlated a 92% emission reduction to a 1 inch soil cover depth with an unknown compaction and moisture rate (Vogel study). Only the minimum soil depth was used in the permit; compaction and moisture not specified. The facility conducts no quality assurance tests to verify the soil compaction achieved at the facility meets the specifications of the study. Without a standard, the current compaction may afford far less VOC control than that cited in the study. The appellants raised these issues in Exhibit 48 (letter to Crow and Sadredrin, October 16, 1998).

The significance of the difference is also unknown, as the facility uses foam when grid tests on the open face at the end of the day indicate that VOC emissions will exceed a threshold. The permit requires Safety-Kleen to apply protective foam to the open working area at the end of the day in which the average VOC content of waste exceed 660 ppmw. Foaming is required when VOC emissions of the 50 x 50' portions of the open face exceed 50 ppmv (as hexane). The appellants did not present clear evidence that the foaming criteria, when used with the unstandardized compacted soil requirement, presented a threat to health and safety. The appellants did not provide clear evidence that the foam threshold exceeded the allowable VOC limit in the permit. The APCD should review this issue closely when the

permit is reviewed to ensure a standard test method is used to verify permit assumptions and that the results of this monitoring are reported for verification of the standard.

4. EIR CONDITIONS

Issue Q.: General Condition 3 -- Appellants assert this condition does not adequately protect public health, safety and welfare because: (1) Safety-Kleen is not abiding by the EIR's representations of air pollution control; and (2) the EIR does not address acceptance of radioactive waste.

General Condition 3 reads "Uses authorized by this conditional use permit are those outlined in the project description as set forth in Chapter 3 of the Supplemental Final Environmental Impact Report (SFEIR), Volume 1, August 1994. Any expansion beyond the scope of activities and uses specified will require either a modification to this CUP or a new CUP as provided by Chapter 19.104 of the Kern County Zoning Ordinance."

Chairman Baggett's response: The appellants did present adequate evidence to indicate they have a substantial likelihood of prevailing on the merits regarding the radioactive waste issue #3 (2), but not the air pollution control issue #3 (1). See discussion of issues Y and P.

From: Councilmember M. J. "Mac" Dube
City of Twentynine Palms, CA
6136 Adobe Road
Twentynine Palms, California, 92277

24 June, 2002

To: Administrative Hearing Office
Judge James Ryden
Air Resources Board
1001 1st Street
Sacramento, California, 95814

Subject: My Decisions on the Appeal Issues (A,C,N,O,P,Q,Y,AA,BB, and CC) Presented to The Tanner Board

PREFACE:

Although no specific format was prescribed for submission of our individual reports, your final briefing as presiding Judge provided all of the members with general guidance for our individual inputs. I have discussed my intended format with you and I submit same for your approval. I must declare, at the outset, that I have dramatically reduced the number of pages submitted from what I had originally drafted.. In fact, this final draft represents approximately half of what my original looked like. Upon review of the first draft, I found that I had effectively regurgitated anew what we had discussed so thoroughly in session in chambers and I found it unnecessary to burden everyone and the record with those same arguments. What appears herein are the remains of my written discussions and final decisions.

The words "CLEAR AND CONVINCING EVIDENCE THAT THERE ARE COMPELLING REASONS TO MODIFY THE PERMIT" remain my mainstay and target or objective statement as I reviewed all of the statements, evidence presented and, in balance, weighed-in on the value of varied witnesses' statements for both sides to decide if Safety-Kleen's (Buttonwillow's), (Safety-Kleen) Conditional Use Permit (CUP) adequately protects the public, health, safety and welfare.

Rather than repeat the DECISION STATEMENT that has been standardized for each of the issues below, I shall state it at this point: ..."FAILS TO MEET THEIR BURDEN , BY CLEAR AND CONVINCING EVIDENCE, A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS OF THEIR CLAIM BECAUSE THEY FAILED TO PRESENT ADEQUATE EVIDENCE TO CONVINCE ME ON THIS ISSUE".

ISSUE A:

Appellants raise this issue as a deficiency in the Federal, State and Local Permit Condition #5

and alleges that the condition makes it ALMOST impossible to ever alter the permit conditions to take into account any change in conditions. They specifically address the acceptance of radioactive waste at Buttonwillow...even in the upcoming renewal permitting process.

DISCUSSION: The County contends that the number of extensions or the overall terms of the CUP is a matter of policy under the cognizance of the Board of Supervisors and that they maintain AUTHORITY over the CUP and the ability to modify the conditions of approval. I find that the County can, indeed, respond to changing situations, needs, and requests and provide protection to its citizens through an established administrative process demonstrably able to be protective to public health, safety and welfare. Any new circumstances of concern may be challenged through changes in the CUP at the time of extensions OR conditions of approval may be modified by the County for cause under Section 19.102.020. I consider the in-place administrative safeguards to be adequately protective of health, safety and welfare.

DECISION: I REJECT this issue for lack of substantive evidence that it fails to protect as described above.

ISSUE C:

Appellant's pre-hearing brief strongly urged the monitoring of Safety-Kleen (Buttonwillow's) Inc. under Titles 22 and 23 of the California Code of Regulations (CCR).

DISCUSSION: However, the need to create a position such as "Public Advocate" for this desired monitoring enforcement was unsupported by evidence that the facility was remiss in their actual supervisorial duties. It is my belief that Appellants failed to meet the minimal standards of proof required to show this as a requirement over and above what is in place by State Agencies, The Department of Toxic Substances Control (DTSC), and the Regional Water Control Quality Board. The negation of a "Public Advocate" was not demonstrated to be potentially injurious to public health, safety and welfare.

DECISION: I REJECT this issue as being unsupported by facts or law and therefore not required. There are adequate monitoring measures in place for Title 22 and 23 enforcement.

ISSUE N:

Appellants question the adequacy of Closure/Post-Closure Condition No.2, which provides that post-closure care for each unit begin immediately after a unit is closed and continues until 30 years after the Facility has received the last load of hazardous waste in accordance with State and Federal laws.

DISCUSSION: Appellants' concerns lie with the bankruptcy status of Safety-Kleen (Buttonwillow) and also claims that condition No. 2 is inadequate because it is less protective

than existing Federal and State law. Countering this point, Respondents point out that DTSC's "practice" is to review Post-Closure care every 5 years and continually extend the 30 year horizon for post-closure care with emphasis on the point that "should circumstances necessitate a longer post-closure care period, the Department will take appropriate action". I have further addressed this extension of time element for post-closure care at ISSUE # Y below.

DECISION: I REJECT Appellants' contention that the County is helpless to change any permit conditions. In this case, upon review, the horizon for post-closure care can, for good cause, be extended.. Condition 2 is in place for that purpose...the granting of extensions should they be found to be necessary.

ISSUE O:

Appellants question the adequacy of Closure/Post Closure Condition No. 3 which provides that Safety-Kleen (Buttonwillow), Inc. must demonstrate continuous compliance with Title 22 and 23 of the CCR, which govern financial assurance for Facility Closure/Post Closure.

DISCUSSION: Despite Appellants' contention that Safety-Kleen could change financial institutions or mechanisms or coverages and thereby fail to provide adequate protection because of policy lapses or cancellations, there are safeguards in place to prevent such actions. Regulatory requirements established by Federal and State law forces Safety-Kleen (Buttonwillow) to fully comply with the financial assurance requirements. They may NOT cancel, terminate or fail to renew the policy even while in bankruptcy status. It does seem odd that Appellants never before requested DTSC to make permit modifications or to take enforcement actions in regards to Safety-Kleen's (Buttonwillow) financial assurance prior to these proceedings. Providing a pre-paid insurance policy for the life of the Facility appears to be a knee-jerk reaction rather than a resolution based on realistic, sound management practice and reality.

DECISION: I REJECT the Appellants" Issue and find that their new proposed condition is not necessary.

ISSUE P:

Appellants, in Issue "P", contend that the County should modify the CUP to require the open face of the Waste Management Unit (WMU), WMU 35, be covered with foam at the end of each day to reduce air emissions and further claim that the Air District's Authority To Construct (ATC) is not protective of public health, safety and welfare because Safety-Kleen is not required to comply with the Best Available Control Technology (BACT) doctrine. The reason given is that they are not being required to use the best cover for the task but are allowed to use an alternate cover methodology through use of soil cover.

DISCUSSION: Having considered the arguments on the delinquent submission of Appellants'

petitions for review of the ATC for the WMU 35 to the Air Pollution Control District (APCD), and then having failed to file their petition for review within the mandatory period, it seems like Appellants are being allowed some additional ample assaults on this issue when it appears that some of this could have been accomplished through administrative action at the County level. I'm not being critical at the latitude afforded during the hearings but it appears that some administrative channels were not explored, for whatever reasons. Throughout that part of the hearings I wondered why these avenues were not vigorously explored. It seemed a logical route for resolving concerns.

Notwithstanding the timeliness part of this issue, alternatives to foaming WERE and ARE legal and viable. Testimony by Respondents' witnesses defused the actual and potential risk factors proffered by Appellants' witnesses and showed the risk range to be acceptable but well within the US , Environmental Protection Agency (EPA), and California acceptable standards where adverse effects are not expected. The Nox emissions portion discussing the purchase of offsets had been found infeasible at the County level and the APCD concurred in the CEQA process that Nox emissions from on-road travel are "largely unmitigatable". As was brought out in the testimony, this is a peripheral item that would be impossible to control for any Facility.

DECISION: I REJECT Appellants' Issue P and further find that their proposed replacement new Air Quality Condition is not necessary to protect public health, safety and welfare.

ISSUE Q:

Appellants, in Issue Q, contend that General Condition No. 3 prohibits all uses of the Facility that are not specifically named in the Supplemental Environmental Impact Report (SEIR) for the modification of the Facility. Further, Appellants declare that a modification of the CUP or the issuance of a new CUP is required and that the present CUP, as written, is ineffective.

DISCUSSION: Appellants base their arguments on the acceptance of the Linde waste at the Safety-Kleen Facility and provide an alternative condition suggested in its opening brief for the Board's consideration..

The counter-argument by Respondents is that all material received at Buttonwillow was within the established range allowed to be accepted at the Facility under the CUP originally issued in 1982. As such, the County did not have to evaluate impacts of continued acceptance of Naturally Occurring Radioactive Material (NORM), or below-NORM level materials in the Supplemental Environmental Impact Report (SEIR) which was completed in 1994 before the CUP was approved for modification of the Buttonwillow Facility. As was repeatedly shown during the Hearings, neither the waste from the Linde site, nor the material from the former Sodium Disposal Facility, which was accepted in 2001, was considered low- level radioactive waste, as defined in the Low-Level Radioactive Waste Policy Act.

I have labored long and hard over this issue and have leaned first in one direction and then the

other. HOWEVER, I keep getting back to what the definition of the waste REALLY IS AND HOW IT HAS BEEN TERMED! Throughout the Hearings I have come to look at "NORM" as what it is...Naturally occurring rather than waste occurring as a result of destruction or demolition of a man-made facility such as Linde/Tanawanda or similar debris which may have been polluted by nuclear residue. In balance, however, we also find "NORM" or "BACKGROUND" for the exact same reasons...fallout in the regions of Nuclear testing sites, old nuclear facilities, etc. The bottom line is that we are left to cope with the levels presented to us rather than the sourcing as an expert declaration has been made that provides all of us with what the safe parameters are; whether or not we accept them is our dilemma.

In this case, the parameters authorized by the Facility's CUP technically conform to criteria probably designed to accept NORM, rather than Low Level Radioactive Waste. I don't believe anyone can deny that fact! The Linde waste was approved to be transported to Buttonwillow because it was NOT considered low-level radioactive waste as defined in the Low Level Radioactive Waste Policy Act. THUS, only because of a technical quirk I have to consider that inadequate evidence has been presented of violations or potential violations which might place the general public at risk.

DECISION: I REJECT the Issue as well as the proposed new condition.

FOOTNOTE ON THE ABOVE ISSUE: Having stated the above, I am not satisfied that the statements made during the hearings and written in the Post-Hearing Briefs by both the Appellants and Respondents concerning the voluntary decision to NOT accept any more Formerly Used Sites Remedial Action Program ("FUSRAP") debris officially solves the problem for Buttonwillow. Should there be any intent to move any of this type of material to Buttonwillow in the future, I'd have an entirely different slant on this issue. I DO NOT have the faith some people seem to have in laboratory tests of liners and materials that make claims of protection of the general population for generations to come when some of these elements, we are briefed, are going to be around in alleged toxic levels for thousands of years. There are properly identified repositories for such materials in our State of California as well as other National sites and they should be properly utilized. If Buttonwillow is to entertain the receipt of any more of this type (Linde/Tonawanda)material, then, there should be commensurate modifications in the permits to allow same. This, I believe, would require a thorough review of the entire process...Top-Down! I have no concerns with the oil field drilling wastes or the Norm under 2000 pCi/gram currently being accepted as per the permit. BOTTOM LINE, FOLKS, IF YOU ARE GOING TO ACCEPT SOME OF THE OTHER "STUFF" LIKE THE PROBLEM "FUSRAP", call the shot the way it SHOULD BE and get the permit revised to handle it or take it to a facility competent to handle Low Level Nuclear Waste at levels commensurate with the levels of radiation emitted that can handle the problem of large volume compounded by degree of toxicity.

ISSUE Y:

Appellants, in Issue Y, allege deficiencies in waste type condition # 2 prohibitions because it allows Safety-Kleen to accept significant amounts of radioactive waste, the impacts of which had not been reviewed prior to the permit being issued. Appellants also propose an allegedly more protective alternative condition for consideration than the one found in the CUP which would prohibit acceptance for treatment, disposal, storage, or transfer at the Lokern Facility; Radioactive materials/and or wastes.

DISCUSSION: This issue, like the previous issue Q, caused me great concern and long reflection before deciding. My footnotes at Q refer to this issue as well! I hovered between acceptance and rejection for days on this one but because of technical aspects of these issues, found that I had to be pragmatic and had to place my personal feelings aside. There were convincing arguments for both sides and both were well presented.. Conversely, there were ample examples of hyperbole flowing for both as well! For Appellants, there is no doubt that Mr. Hirsch believes in what he says and knows his topics, however, in my opinion, he often overstated some data by extending it much too broadly to the Safety-Kleen Facility. Statements such as contained in the Post Hearing Brief of..."1200 pounds of Plutonium239- (in his hypothetical)...one of the most dangerous radio nuclides known to science...this is the same amount of plutonium found in 180 Nuclear Bombs" etc.etc.

Conversely, the vacillation in the descriptive language of the leachate collection systems by Respondents concerning WMU 28,33,34,and 35 leave me wondering about what their true faith REALLY is in their WMU liner systems. I take away very little comfort in terminology such as "VIRTUALLY IMPOSSIBLE" for radio nuclides to leak from those WMU into the groundwater. (And in the next breath)..."if there ever were a leak, the leak would be detected in time to take any corrective action that might be necessary to protect public health, safety and welfare." True, the liners of today are much more stronger, by far, than those of 20 years ago, however, even these new ones have only undergone field testing and laboratory tests for a relatively short time. Given their projected long-termed limits, one is left to wonder if the public is truly protected. What if a liner does leak past the secondary leachate collection system? Then what? Do you then cause removal of thousands or hundreds of thousands of tons of matter to repair the torn system or do we simply accept the insult to the environment and does the water table etc. remain violated for our future generations?

I have weighed in heavily on the concept proffered of extending the length of post-closure care periods beyond those original 30 years to protect public health, safety and welfare as explained by witnesses, including Mr Ross. The DTSC review of post-closure care every five years and continuous extensions of time for the horizon for said post-closure has defused the issue in my mind.

With due respect for MR. Hirsch's experience, one was made to feel that he seemed to want to overstate his case statistically rather than concentrating on the extant case and data. Projections are impressive and can make a case, pro or con, for whichever side presents them. It was

evident that we were hearing the worst-case scenario at every turn complete with maximum dose-rates and calculations that were, by design, intended to impress. That would have been fine if the intent, or perhaps the possibility of future occurrences would be monthly deposits of Linde type waste at Buttonwillow with the same emission rates, tonnage, and standards as those we were concerned with in that one shipment. Perhaps that was what was intended! The counter-presentations by Respondents were also effective.

DECISION: I REJECT the Issue and the new Waste Type Condition offered for consideration. My footnotes to Issue Q above also apply to this issue and should be considered herewith.

ISSUE AA:

Appellants address deficiencies in issue "O" in Closure/Post-Closure Condition # 3 which requires Safety-Kleen to provide continuous financial assurance for the Facility's Closure-Post-Closure maintenance. Specifically, this is requested because they claim the present CUP does not protect because it does not account for the acceptance of radioactive waste.

DISCUSSION: There is no evidence that bankruptcy proceedings have adversely affected Safety-Kleen's ability to comply with financial assurance mandates for the present time or for the future. If DTSC finds, at some future date, that the closure fund is inadequate, they can and will require the Facility to adjust the estimate and fund accordingly.

DECISION: I REJECT ISSUE AA. Closure Condition No. 3 adequately protects public health, safety and welfare.

ISSUE BB:

Appellants, in Issue BB, challenge the adequacy of Closure/ Post-Closure Condition No. 4 which provides that Safety-Kleen must revise the cost estimates for closure and care plans whenever changes take place that might increase those costs.

DISCUSSION: If any changes warrant modifications of the Facility's Post-Closure care requirements, DTSC will so direct. Regulatory mechanisms are in place and requirements are established by Federal and State law and either will be or can been addressed by DTSC.

DECISION: I REJECT ISSUE BB. Post Closure Condition No. 4 adequately protects public health, safety and welfare and the new proposed condition by Appellants is unnecessary.

ISSUE CC :

Appellants, in Issue CC, attack the adequacy of General Condition No. 5 which provides Safety-

Kleen must be insured in accordance with State and Federal laws.

DISCUSSION: Appellants' concerns and allegations in this issue are the same as those addressed in Issue O. They request a pre-paid insurance policy to prevent a lapse in coverage for the Facility.

DECISION: I REJECT ISSUE CC. For the same reasons as for issues O, AA, BB above. This is a redundant issue and not supported by evidence. DTSC controls and regulatory mechanisms are already in place to ensure compliance in these areas.

CLOSING COMMENTS: None of these issues are cut and dry and I do not mean to imply by the responses that any are deemed more important than others. I am sure that this has been a long and arduous task for all concerned and both sides and my fellow Members are to be commended on the professional manner with which they have approached the task.

I have learned much during the past several months and have gained a greater appreciation for many things that perhaps here-to-fore I took for granted. I thank all concerned for their professionalism, courtesies, and imparting of their knowledge and expertise. I feel that I am a better man for having made your acquaintance.

Thank You All

Very Respectfully

M. J. "Mac" Dube

BOARD OF SUPERVISORS
COUNTY OF TULARE

BILL MAZE
Supervisor District Three

I, Bill Maze, Tulare County Supervisor, sitting as a member of the Tanner Act Appeal Board, In the Matter of an Appeal Under the Tanner Act, Health & Safety Code Section 25199 *et seq.*, Kern County's Approval of Conditional Use Permit No. 4, Map No. 97

PADRES HACIA UNA VIDA MEJOR., Juanita Fernandez, Lorenzo Garcia, Rosa Solorio-Garcia, Dora Montoya, Eduardo Montoya, Saul Moreno, Sylvia Moreno, Manuel Perez and Juan Reyes. Appellants,

V.

COUNTY OF KERN and SAFETY-KLEEN (BUTTONWILLOW), INC. Respondents.

The following information sets forth the details of the findings and conclusions to which I arrived after the extensive reading and review of testimony received, and taken into submission prior to my rendering these decisions.

In the matter of multiple issues, they shall be outlined individually or collectively:

ITEM A. FEDERAL STATE AND LOCAL CONDITION #5 IS NOT ADEQUATELY PROTECTIVE BECAUSE IT ALLOWS THE FACILITY TO OPERATE INDEFINITELY WITHOUT SUFFICIENT PUBLIC INPUT UNDER STATE AND LOCAL LAW.

FINDING: **Deny. (No to appellants.) - The conditional use permit does provide for the review of the term of the permit and the County has the virtual authority to modify conditions of approval.**

ITEM C. FEDERAL, STATE, AND LOCAL CONDITION #7 IS NOT ADEQUATELY PROTECTIVE BECAUSE STATE AND COUNTY REGULATORY AGENCIES ARE NOT ENFORCING ITS PROVISIONS.

FINDING: **Deny. (No to appellants.) The appellants do not even mention Item C in their post hearing briefs. The permit indicates enforcement must comply with Titles 22 and 23 and presented no evidence that complaints or violations had or have occurred.**

ITEM N. CLOSURE/POST CLOSURE CONDITION #2 IS NOT ADEQUATELY PROTECTIVE BECAUSE IT NEITHER ACCURATELY REFLECTS FEDERAL AND STATE LAW NOR TAKES INTO ACCOUNT SAFETY-KLEEN'S CURRENT FINANCIAL STATE.

FINDING: **Deny. (No to appellants.) Although appellants attempt to suggest or establish a premise that the operator, Safety-Kleen or the County must somehow perform to some eternal timeframe requirement, the appellant's arbitrarily desired outcome is well outside the regulations set forth in existing Federal and State Law utilized by the permitting authority and granting the Conditional Use Permit (C.U.P.) The submission by appellants that the bankruptcy proceedings render Safety-Kleen incapable to secure financial assurance of their choice, by virtue of the same; releases or eliminates the operators to maintain**

in full force and affect their mandated responsibility for financial assurance requirements is found to be without merit.

ITEM O. CLOSURE/POST CLOSURE CONDITION #3 IS NOT ADEQUATELY PROTECTIVE BECAUSE IT DOES NOT SPECIFY A MECHANISM FOR PROVIDING FINANCIAL ASSURANCE.

FINDING: **Deny. (No to appellants.) The respondents well defined the Federal and State regulations setting forth the requirements of financial assurances for a facility like Safety-Kleen and that the same is being met. As well, that the bankruptcy issue has not relieved or lessened the degree to which the financial assurance in force and affect as selected by the Safety-Kleen facility which must be maintained for compliance purposes.**

ITEM P. THE AIR QUALITY CONDITIONS ARE NOT ADEQUATELY PROTECTIVE BECAUSE THEY IGNORE SIGNIFICANT IMPACTS OF NOx EMISSIONS FROM TRUCKS AND DO NOT REQUIRE SAFETY-KLEEN TO OPERATE IN CONFORMANCE WITH REPRESENTATIONS MADE DURING THE PERMITTING PROCESS.

FINDING: **Deny. (No to appellants.) The Air District permit requirements are being adhered to by Safety-Kleen. There is not a mandate to perform to a more strict performance result or outcome as desired by appellants. The project Environmental Impact Report (EIR) is a guidance document only, not a strict verbatim guideline.**

ITEM AA. CLOSURE/POST CLOSURE CONDITION #3 IS NOT ADEQUATELY PROTECTIVE BECAUSE IT DOES NOT REFLECT THE IMPACT OF SAFETY-KLEEN'S DECLARATION OF BANKRUPTCY OR ITS ACCEPTANCE OF RADIOACTIVE WASTE ON ITS INSURANCE COVERAGE.

ITEM BB. CLOSURE/POST CLOSURE CONDITION #4 IS NOT ADEQUATELY PROTECTIVE BECAUSE IT DOES NOT ACCOUNT FOR SAFETY-KLEEN'S DECLARATION OF BANKRUPTCY OR ITS ACCEPTANCE OF RADIOACTIVE WASTE.

ITEM CC. GENERAL CONDITION #5 IS NOT ADEQUATELY PROTECTIVE BECAUSE IT DOES NOT REFLECT THE IMPACT OF SAFETY-KLEEN'S DECLARATION OF BANKRUPTCY OR ITS ACCEPTANCE OF RATIOACTIVE WASE ON ITS INSURANCE COVERAGE.

FINDING: **Deny AA, BB, CC (No to appellants.) These items are denied for the same reasons noted in Items "N" and "O" above.**

ITEM Q. GENERAL CONDITION #3 IS NOT ADEQUATELY PROTECTIVE BECAUSE THE FACILITY IS NOT ABIDING BY THE EIR AND IS ACCEPTING RADIOACTIVE WASTE.

FINDING: **Deny. (No to appellants.) Recognizing this item as one of the two most contentious of the appeal allegations, the arguments did not sufficiently persuade myself to conclude that the facility was not complying with daily cover requirements or specifications per the permit granted by the outside regulatory agency(ies). On the issue of radioactive waste, the facility is licensed to accept "Naturally Occurring Radioactive Material", (N.O.R.M.) waste; and although some evidence in the record referenced letters and telephone calls indicating some 'miscue' as to administrator or director level**

personnel being misinformed or their lack of approval having been obtained. The degree of examination and cross-referencing of the documents in evidence yielded, to my satisfaction, that the radioactive N.O.R.M. wastes received at the facility was allowed by the permit in effect and properly disposed of in the waste management unit (WMU's), and the State and Federal elected officials and agency directors did determine appropriate procedures were followed.

ITEM Y. WASTE TYPE CONDITION #2 DOES NOT ADEQUATELY PROTECT THE PUBLIC HEALTH, SAFETY AND WELFARE BECAUSE IT ALLOWS SAFETY-KLEEN (BUTTONWILLOW), INC. TO ACCEPT RADIOACTIVE WASTE.

FINDING: **Deny w/stipulation(s). (No to appellants w/slight consideration). The issue of the 2000 picocurie per gram requirement threshold; that has been utilized as some sort of health hazard cutoff-point is best characterized as a 'mysteriously' derived verge and that, should that line be crossed, one would be in the verboten or precarious health risk territory. I was exceedingly less inclined; to the testimony of the expert witness, Mr. Hirsch, for the appellants than Dr. Whipple for the respondents, yet there seemed a meeting of the minds that the 2000 picocuries per gram relative to various types of radionuclides yield different requirement meanings. Thus, I am a bit concerned as to the accuracy of the substantiation or lack thereof as to the validation of the radioactive waste as classified N.O.R.M. and Nuclear Regulatory Commission (N.R.C.), or Formerly Utilized Sites**

Remedial Action Program (FUSRAP), regulated, wastes, delivered to the site and labeled 'safe'. Further, I remain satisfied that the permit allowed, and procedures were followed to accept, dispose and store the materials from Linde and Santa Susana sites, and the operators performed all reasonable due diligence to determine they were not accepting ineligible or illegal materials.

I do think that a gap appears in State regulatory oversight by the Department of Toxic Substances Control (DTSC) agency as revealed by these appeal proceedings. Finally, I believe that Kern County, as the permitting authority, should require in writing a declaration from the facility operators that no future FUSRAP or Department of Energy (D.O.E.) waste will be accepted.

BILL MAZE, Supervisor
County of Tulare
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STEVE A. PEREZ

KERN COUNTY BOARD OF SUPERVISORS

Air Resources Board
Administrative Hearing Office
Administrative Law Judge James R. Ryden
1001 I Street, P.O. Box 2815
Sacramento, CA 95812

Dear Judge Ryden:

As a Member of the Tanner Appeal Board, I am attaching my opinion in the matter of an Appeal Under the Tanner Act Health & Safety Code 25199 et seq., Kern County's Approval of Conditional Use Permit No. 4, Map 97.

I have attached my opinion on Issues A, C, N, O, P, Q, Y, AA, BB, CC.

Please feel free to contact me should you have any further questions.

Thank you.

Sincerely,

Steve A. Perez
Chairman
Kern County Board of Supervisors

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STEVE A. PEREZ

KERN COUNTY BOARD OF SUPERVISORS

STATE OF CALIFORNIA

ENVIRONMENTAL PROTECTION AGENCY

TANNER APPEAL BOARD

In the Matter of an Appeal Under the Tanner Act
Health & Safety Code 25199 et seq.,
Kern County's Approval of Conditional Use Permit No. 4, Map 97:

STEVE A. PEREZ, CHAIRMAN,
BOARD OF SUPERVISORS
COUNTY OF KERN

Member, Tanner Appeal Board

OPINION on Issues A, C, N, O, P, Q, Y, AA, BB, CC.

June 2002

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INTRODUCTION

My understanding of the Tanner Appeal Board is to determine whether or not to accept the appeal. I further understand if the Board chooses to, it can accept the entire appeal; we can choose to accept certain portions of the appeal; or we can determine not to accept the appeal at all.

My opinion is made with the understanding that the standard used for this opinion is the appellant, Padres Hacia Una Vida Mejor, must have presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

I will attempt to address each item individually, stating my yea or nay of accepting the appeal or not and then elaborating on the reasons for my decision.

ISSUE A

No - The appellant has not presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

Appellants contended that Condition No. 5 is inadequate due to the possibility of indefinite renewals.

The issue of extensions to a Conditional Use Permit are a matter of policy for the Board of Supervisors. As long as all conditions for approval are met, an extension can be granted. Appellants argued future permit renewals would be exempt from the Tanner process. The County requires, as a condition of the Tanner Act, conformity with the Tanner Act.

The issue of limiting conditions that may be imposed was answered by testimony of County Planning Director, Ted James. Mr. James testified that the County retains authority over the Conditional Use Permit and has the ability to modify the conditions of approval.

ISSUE C

No - The appellant has not presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

The permit condition does not vest direct enforcement authority with the County. The Department of Toxic Substances Control and the Regional Water Quality Control Board are the enforcement agencies.

The Director of Planning, Ted James, testified that the inclusion of a condition such as this one, requiring a permitee to comply with regulations enforced by the State agencies, simply gives the County our indication or measure concerning whether it should initiate enforcement proceedings or proceedings to modify or revoke the permit under its own ordinance.

ISSUE N

No - The appellant has not presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

In Issue N, the adequacy of Closure/Post-Closure Condition No. 2 was raised. Appellants contended that the permit condition does not allow for extensions of the post closure period.

As noted in Permit Comment Response (PCR) 1-56, the Department of Toxic Substances Control (DTSC or Department) is mandated by 22 Cal. Code Regs., section 66264.117 (b) to require post-closure care for the facility for 30 years after completion of closure. The Department has the discretion of increasing the post-closure care and monitoring period at any time during the facilities operating life or during the closure or post-closure care period, should circumstances warrant such an extension of the post-closure care period.

At this time, there is no information or circumstance specific to this facility to warrant extending the post-closure care period beyond 30 years. It is noted that this facility has many protective design and monitoring features not found at most other landfills, which may very well result in post-closure care period in contrast to other landfills, which likely will require post-closure care well in excess of 30 years. The Department (DTSC) will continue to assess factors which dictate the necessary post-closure care period for this facility throughout its active life, as well as the closure and post-closure periods. As required by regulation, should circumstances

necessitate a longer post-closure care period, the Department will take appropriate action.

ISSUE O

No - The appellant has not provided sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

Appellants raise the issue of deficiencies in Closure/Post-Closure Condition No. 3, which requires Safety-Kleen to provide continuous financial assurance for the facility's closure and post-closure maintenance. Further, they state it does not protect the public's health, safety and welfare because it does not protect the public against the possibility of Safety-Kleen's bankruptcy.

In my opinion, the Certificate of Insurance for Closure and/or Post-Closure addresses the appellants issues. The last sentence of the first page (Exhibit 92) reads: Cancellation, termination, or failure to renew <u>will not occur</u> and the policy will remain in full force and effect in the event that on or before the date of expiration:

Top of pg. 2

(1) The Department of Toxic Substances Control (DTSC) deems the facility/TTU abandoned; or

(2) The permit is terminated or revoked or a new permit is denied by the DTSC; or

(3) Closure is ordered by the DTSC; or any other State or Federal agency, or a Court of Competent jurisdiction; or

(4) The owner or operator is named as a debtor in a voluntary or involuntary proceeding under Title II (Bankruptcy) U.S. Code; or

(5) The premium due is paid.

Appellants did not provide any evidence to the contrary.

ISSUE P

No - The Appellant has not presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

Appellants raised the question regarding the air district improperly calculated Volatile Organic Compounds (VOC) emissions from the facility. We received substantial testimony from Seyed Sandredin, Dr. Scofield and Cliff Scholle.

Although there were differences of opinion regarding the proper model to determine the VOC emissions, Seyed Sandredin testified that the Environmental Protection Agency (EPA) did approve and recommend the model that was used. There were no comments by the EPA on the proposed permit.

Mr. Sandredin testified the emissions of VOC's from Waste Management Unit (WMU) 35 will be controlled 99% (as described in the Supplemental Environmental Impact Report (SEIR)) by a combination of technologies and practices. He further testified, to achieve that degree of control, the Air Pollution Control District (APCD) did not require that the open face of WMU 35 be covered with foam everyday. Mr. Sandredin testified that the APCD limited the amount of waste that may be received to no more than 4,050 tons per day and 352,105 per year.

Mr. Sandredin testified that the Best Available Control Technology (BACT) required by the APCD's Rules and Regulations was covering the open face of WMU 35 with one inch of clean,

compacted soil, which (by itself) would control the emissions of VOC's by 92%. He testified further that the combination of technologies and practices required in the Authority To Construct (ATC) for WMU 35 will control the emissions of VOC's by 99%.

ISSUE Q

No - The Appellant has not presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

My comments on Issue P partially cover my thoughts regarding this issue (last paragraph). Specifically, Seyed Sandredin of the Air Pollution Control District (APCD) testified at one point in the proceedings that the emissions of Volatile Organic Compounds (VOC) from Waste Management Unit (WMU) 35 will be controlled 99% (as described in the Supplemental Environmental Impact Report (SEIR) by a combination of technologies and practices. He further testified, to achieve that degree of control, the APCD did not require that the open face of WMU 35 be covered with foam everyday.

ISSUE Y

Yes - I believe the appellant has presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

The issue of non-Nuclear Regulatory Commission waste and norm are complex issues at the very least. Let me first point out that I believe Safety-Kleen (Buttonwillow) runs a "state of the art" hazardous waste facility.

It is my opinion that Safety-Kleen (Buttonwillow) has acted perfectly legal in accepting the waste from the Linde and Santa Susana sites.

Responding to the concerns expressed by Senators Boxer, Kuehl and Assemblyman Flores, California Environmental Protection Agency Secretary Hickox and California Health and Human Services Agency Secretary Grantland Johnson, informed Assemblyman Flores that a team of radiation experts were assembled by Department of Health Services to evaluate whether the disposal of the waste from the Linde site at the facility were safe.

They informed Assemblyman Flores that, when Department of Toxic Substances (DTSC) and Department of Health Services (DHS) conducted joint testing at the Buttonwillow facility, DTSC and DHS found no radiation above background levels at the site. And stated that there was no known safety or health risks to the community.

In response to Senator Boxer's letter, Assistant Secretary Westphal

responded, in part, because the materials involved are primarily solid concrete and wood debris, the potential for migration of entrained radioactive materials through the liners and into the environment is negligible. He further recognized the construction of the facility and the leachate collection systems. Secretary Westphal pointed out that the Buttonwillow facility poses no immediate threat to public health or surrounding communities.

It disturbs me, however, that no agency directly regulates the non-Nuclear Regulatory Commission waste stream. I feel the many regulatory agencies have dropped the ball in truly assessing the possible impacts of nuclear waste.

It is this concern that prompts my opinion to accept the appeal on Issue Y. I believe there are significant holes that could, in the long term, present an impact to the public's health and safety. I believe policy needs to be developed that would clearly establish safe levels of radioactive wastes. The 2000 pc/gm needs to be validated with good science establishing a safe level for each radio nucleide. For instance, is 2000 picocuries of plutonium - 239 the same as 2000 picocuries of cesium - 137? I believe the 2000 picocure measurement does not fit all radionuclides. Given this, I believe agencies of the government need to establish safe levels and an accepting facility needs to be able to measure the shipments to determine the levels of the waste prior to accepting it.

As for the norm waste, I believe it is acceptable to continue to receive these types of radionuclides. But, a thorough characterization of the norms should be conducted to create a baseline for future testing.

ISSUES AA, BB, CC

No - The appellant has not presented sufficient evidence of a clear and convincing nature to show they have a substantial likelihood of prevailing on the merits.

June 23, 2002

James R. Ryden
Administrative Law Judge

A.	Federal, State and Local Permit Application Condition 5.	
	Safety-Kleen's track record showed that they did everything that they should do for this permit.	**Reject issue A.**
C.	Federal, State and Local Permit Application Condition 7.	
	Safety-Kleen was in compliance with the permit.	**Reject issue C.**
N.	Closure/Post-Closure Condition 2.	
	Safety-Kleen was in compliance with the permit.	**Reject issue N.**
O.	Closure/Post-Closure Condition 3.	
	Safety-Kleen was in compliance with the permit.	**Reject issue O.**
P.	The Air Quality Conditions.	
	Safety-Kleen was in compliance with the permit.	**Reject issue P.**
Q.	General Condition 3.	
	Conditional use permit needs more protective conditions. The EIR does not address the acceptance of radioactive waste.	**Accept issue Q.**
Y.	Waste Type Condition 2.	
	The permit needs more protective conditions. A more protective permit condition would do so.	**Accept issue Y.**
AA.	Closure/Post-Closure Condition 3.	
	Safety-Kleen's declaration of bankruptcy and the fact that the acceptance of radioactive wast may increase post-closure and clean-up costs.	**Reject issue AA.**